



- (3) Is the claimant entitled to future medical benefits?
- (4) Is the claimant entitled to unauthorized medical expense?
- (5) Is the claimant entitled to additional payment of temporary total disability benefits?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the argument of the parties, the Appeals Board finds:

(1) Claimant has established by a preponderance of the credible evidence that she suffered accidental injury arising out of and in the course of her employment on August 31, 1989. Claimant has not, however, established that she suffered permanent impairment as a result of that injury.

Claimant first filed an application for hearing, dated October 4, 1989, alleging accidental injury on August 31, 1989. Claimant testified that on August 31, 1989 she began experiencing back pain while performing lifting activities required by her job. She acknowledged that she did not advise her supervisor on that date, but testified she did tell several co-employees. Claimant stated that she had experienced back pain on other occasions and that muscle relaxers had relieved the symptoms. She expected a similar result in this case. She testified that on Friday, September 1, 1989, she contacted her family physician, Dr. Friesen, and he did prescribe muscle relaxants.

Claimant was on vacation for the following week. She testified that she continued to have back pain during the vacation. Upon returning from vacation, she scheduled an appointment with Dr. Sellers for September 8, 1989. The history shown in the doctor's records reflect uncertainty about whether work had been the cause of the condition. However, claimant completed an accident report on that same date indicating a work-related injury at Jackson Ice Cream Company on August 31, 1989. Marcia Budge, Dr. Seller's nurse, recommended claimant return to see Dr. Sellers on Monday, September 11, 1989. Claimant contacted her supervisor, Mr. Ron Charland, on Sunday, September 10, 1989 and advised him she would not be able to be at work on Monday, September 11, 1989. The parties disagree about the content of the conversation between Mr. Charland and the claimant. Mr. Charland indicated claimant advised him that she had somehow hurt her back on vacation. Claimant, on the other hand, indicated she simply told Mr. Charland she would not be able to go to work on Monday. Upon a review of the record, it appears Mr. Charland did not understand claimant to be claiming a work-related injury. However, claimant had already indicated to the doctor she thought it might be work related. She had also filled out an accident report on September 8, 1989, clearly attributing the injury to her work. Under the circumstances it seems unlikely that claimant would have intended to convey the opposite impression to Mr. Charland in her phone conversation.

On balance, the Appeals Board believes the evidence does establish claimant suffered an aggravation of her back condition on August 31, 1989. Her apparent uncertainty about whether this was work related seems more likely attributable to the fact there was no specific event, only the general lifting, causing the pain. The Appeals Board finds credible claimant's statement that she experienced onset of the back pain from her lifting activities on August 31, 1989.

The Appeals Board finds, on the other hand, that the injury of August 31, 1989 resulted in only a temporary aggravation of claimant's low back condition. Upon her return from vacation claimant saw Dr. Sellers first on September 11, 1989, and then again on September 18, 1989. On each occasion Dr. Sellers took claimant off work for one (1) week. Claimant returned to work on September 25, 1989. At the time she returned Dr. Sellers had recommended a temporary lifting restriction of thirty (30) pounds. Respondent accommodated this restriction and claimant gradually returned to her regular duties. At the time of the preliminary hearing held in this case on November 9, 1989, claimant testified that she was no longer having any difficulty with her back. As a result, the Administrative Law Judge authorized Dr. Sellers for additional treatment, but did not order temporary total disability benefits. Dr. Sellers testified that his last examination in September 1989 revealed full range of motion, no neurological deficits and a negative physical examination. He did not give an impairment rating. At the time claimant saw Dr. Schlachter in 1991, she gave a history of accident on August 31, 1989, but the history he recorded shows no additional problems until she injured herself in 1991 lifting a fifty-five (55) gallon bucket.

From the record as a whole the Appeals Board finds claimant suffered an injury on August 31, 1989, but further finds that that injury resulted in temporary impairment only. From the evidence it appears claimant was totally disabled for the period September 10, 1989, when Dr. Sellers' assistant advised she should be off work until September 25, 1989 at which time the claimant returned to work after release from Dr. Sellers. Because the temporary total disability did not last for three (3) weeks, the first week was not compensable. Claimant would be entitled to 1.29 weeks of temporary total disability at the maximum rate of \$271.00.

(2) The Appeals Board finds that claimant has not filed a timely application for hearing as required by K.S.A. 44-534(b) for any claim other than the August 31, 1989 injury. Claimant has filed only one (1) application for hearing in this case and that application for hearing alleges an accidental injury on August 31, 1989. Following that application a preliminary hearing was held on November 9, 1989. As previously indicated, claimant returned to work on September 25, 1989 and continued to work through February 11, 1991. In February, claimant was again taken off work. Respondent admitted notice and written claim of an injury on February 11, 1991. For that injury respondent paid temporary total disability benefits in the amount of \$914.62 and provided medical expenses in the amount of \$377.00. The last payment of compensation was March 13, 1991.

At a regular hearing held in this matter on February 9, 1995, claimant's counsel alleged injury from August 31, 1989 through February 11, 1991. Respondent asserted at that time that no timely application for hearing was filed on such a claim. Claimant had not filed an Application for Hearing alleging either a continuing injury from August 31, 1989 through February 11, 1991 or alleging a separate injury on February 11, 1991.

The Appeals Board agrees that a timely application for hearing has not been filed on any claim other than the August 31, 1989 accident. Claimant does not, in fact, testify to continued aggravation for the period August 1989 through February 1991. At the regular hearing, she testified that her condition became worse after August 1989. Without describing any further specific event claimant then testified that she was taken off work again in February 1991. The history reflected in Dr. Schlachter's records, for an exam in June 1991, suggests a second specific aggravating event in February 1991 while lifting a fifty-five (55) gallon barrel. Respondent has attached employee's report of accident for an injury on February 11, 1991, again suggesting a second aggravating event. Dr. Schlachter

finds a five percent (5%) impairment of function from an exam done in June 1991. He does not specifically testify to the cause of this but does, by history, appear to attribute it to an accident of February 11, 1991.

Regardless of whether the claim is or should be for an accident over a period from August 1989 through February 1991 or, on the other hand, a second specific accident on February 11, 1991, claimant has not filed an application for hearing for either. Pursuant to K.S.A. 44-534(b) an application for hearing must be filed within three (3) years of the date of accident or two (2) years after the last payment of compensation, whichever is later. The last period of compensation in this case was, as indicated, March 1991. Even if the original application is considered to be amended at the time of the regular hearing in February 1995, the amendment would be beyond the time limit for application for hearing.

Accordingly, the Appeals Board finds that claimant suffered an accidental injury arising out of and in the course of her employment on August 31, 1989 resulting in temporary aggravation of her low back condition and entitling her to payment for the treatment provided by Dr. Sellers and to temporary total disability benefits for the period September 10, 1989 through September 25, 1989.

Claimant's claim for injury either of February 11, 1991 as a separate accident or for a period of accidents from August 31, 1989 through February 11, 1991 is denied on the grounds that claimant has failed to file a timely application for hearing.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, dated April 11, 1995, should be, and hereby is, modified as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Tamra J. Ericson, and against the respondent, Jackson Ice Cream Company, and its insurance carrier, CNA Insurance, for an accidental injury which occurred August 31, 1989 and based upon an average weekly wage of \$478.72, for 1.29 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$349.59 making a total award of \$349.59.

As of October 17, 1995, there is due and owing claimant 1.29 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$349.59 which is ordered paid in one lump sum less any amounts previously paid.

Claimant's requests for additional temporary total benefits, unauthorized medical benefits, and future medical are denied.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such is directed to pay costs of the transcripts as follows:

Patty Morton, C.S.R.  
Deposition of Ronald Charland  
dated October 30, 1989

\$ 84.00

Deposition of Dr. Scott Sellers dated March 29, 1995	\$148.00
Total	\$232.00
Owens, Brake & Associates Preliminary Hearing Transcript dated November 9, 1989	\$193.90
Owens, Brake, Cowan & Associates Regular Hearing Transcript dated February 9, 1995	\$190.12
Kelley, York & Associates Deposition of Dr. Ernest Schlachter dated February 15, 1995	\$152.28

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1995.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: David H. Farris, Wichita, Kansas  
John Hayes, Hutchinson, Kansas  
George R. Robertson, Administrative Law Judge  
Philip S. Harness, Director